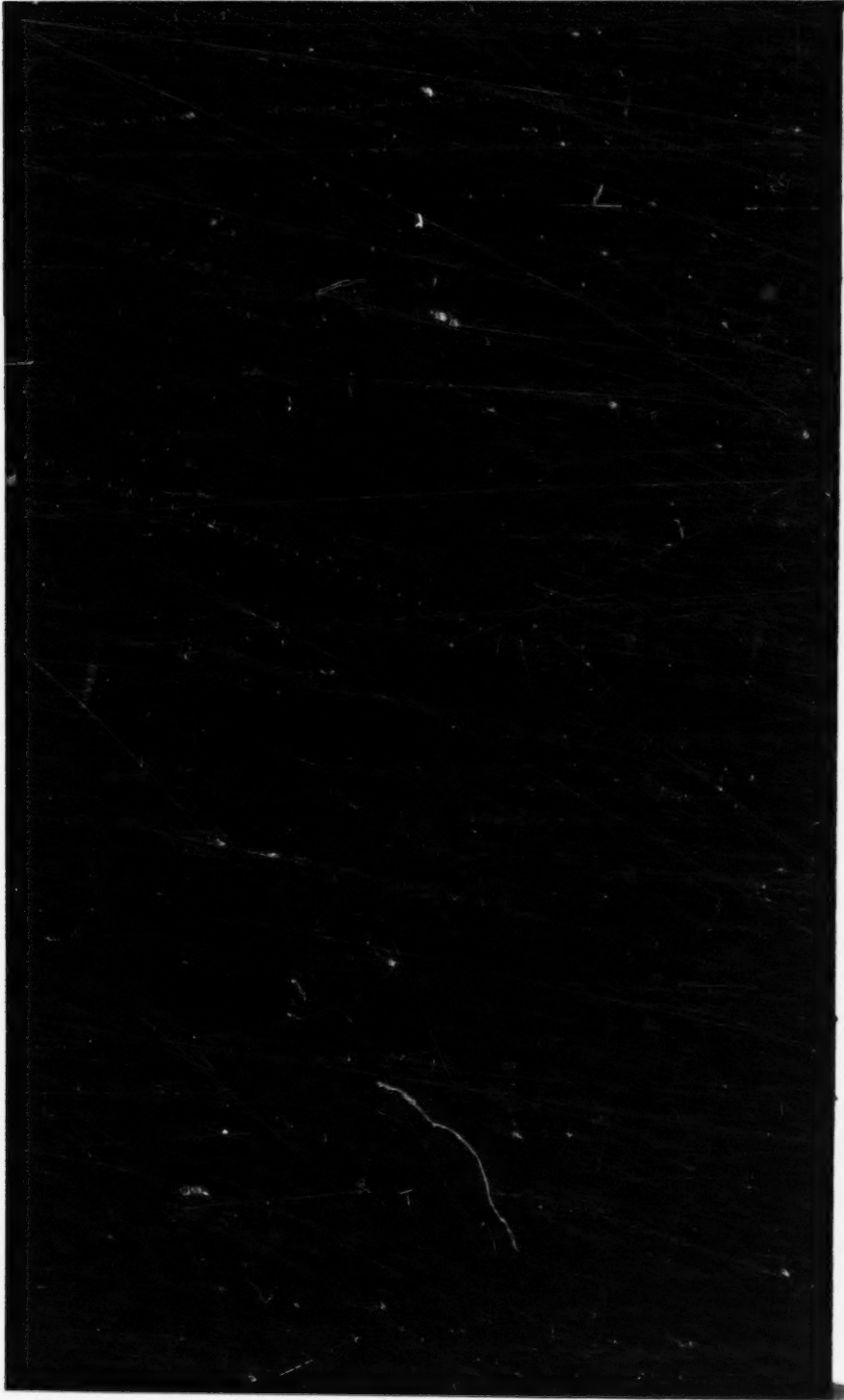

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-801

JOSEPH MAURO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the courts below erred in finding untimely his motion to suppress physical evidence, made seven days after his trial had begun, and that the district court erred in its alternative holding that the search and seizure was legal.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of having conspired to deal in counterfeit money, in violation of 18 U.S.C. 371, and of having possessed and transferred 500 counterfeit $10 bills, in violation of 18 U.S.C. 472 and 473. He was sentenced to concurrent prison terms of two years on each of the substantive charges, subject to the immediate parole eligibility provision of 18 U.S.C. 4208(a)(2); imposition of sentence on the conspiracy charge was suspended, and petitioner was placed on two years' probation to commence after service of the prison sentence. The court of appeals affirmed (Pet. App. A).

The facts, which are undisputed, are set forth in the opinion of the court of appeals (Pet. App. A, pp. A-2 to A-4). Briefly, they show that petitioner agreed to supply co-conspirator Louis Stoppiello with counterfeit bills in denominations of $10 and $20, to be sold at about 30% of face value. The proceeds were to go to petitioner as payment on a debt owed him by Stoppiello. In January 1972, pursuant to the conspiracy, petitioner directed Stoppiello to remove $5,000 in counterfeit bills from the back seat of petitioner's car and to transfer them to "Mickey". Stoppiello had been introduced to "Mickey" by Sal Seminara, who was cooperating with the government and who participated in the negotiation and transfer here. "Mickey" was an undercover agent. When the counterfeit money was transferred, petitioner, who was watching the transfer, was arrested, and his automobile was seized and delivered to the Bureau of Customs for forfeiture pursuant to 49 U.S.C. 781 and 782.

Following his indictment, Stoppiello began cooperating with the government. With Stoppiello's consent, petitioner's involvement in this transaction was fully substantiated by three recorded conversations between petitioner and Stoppiello, which were played for the jury. In addition, petitioner's involvement was corroborated by the introduction of five counterfeit $10 bills, the serial numbers of which matched those printed on the money transferred to the undercover agent. These bills had been removed from the steering column of petitioner's previously seized automobile immediately after Stoppiello had advised agents, on March 3, 1972, that several counterfeit bills were hidden in the steering column of petitioner's automobile.[1] It is the seizure of these bills that was the subject of petitioner's motion to suppress.

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[1]Ten days later petitioner petitioned for and obtained a return of the seized automobile. The forfeiture proceedings which the government had instituted were then abandoned.

1. Petitioner contends that the court of appeals erred in affirming the district court's ruling that the motion to suppress was untimely and in failing to consider the merits of the motion.

The district court had denied the motion on its merits, finding the warrantless search and seizure reasonable because the automobile had been lawfully seized for forfeiture, and also because there had been no unreasonable delay in the forfeiture proceedings. It had also held that the motion to suppress was untimely (Pet. App. B, pp. B-1 to B-3).

The court of appeals did not reach the merits of the motion to suppress, but simply affirmed the finding that the motion was untimely, in an opinion upon which we rely (Pet. App. A, pp. A-6 to A-11).

In so acting, the court of appeals noted, in addition to the circumstances surrounding discovery of the counterfeit money in petitioner's automobile, that petitioner stated during the recorded conversation of July 12, 1972 that he and his attorney knew of Stoppiello's role in the discovery of the counterfeit bills in the steering column of the car (Pet. App. A, pp. A-5 to A-6). Although petitioner later discharged the attorney referred to in that conversation, petitioner's new attorney was furnished a transcript of that conversation, as well as the two others, on January 14, 1974. Moreover, on January 26, 1974, petitioner and his attorney listened to the actual tape recordings of the conversation. However, it was not until March 4, 1974, five weeks later and seven days into the trial, that petitioner moved for suppression of the counterfeit bills found in the steering column of the car. The motion was purportedly based on information contained in material supplied by the government several days earlier pursuant to 18 U.S.C. 3500, but it was clear that petitioner and his counsel had known all the relevant facts long before trial.

The court first pointed out that it has been long-standing practice to require that motions to suppress be made prior to trial, except where there was no opportunity to do so, where the grounds for the motion were not known to the defendant, or when the trial court, in its discretion, permits untimely motions to be heard (Pet. App. A, pp. A-6 to A-7). The court then noted the reasons for the requirement that such motions be made before trial—namely, to avoid interruptions of a trial in progress and the concomitant inconvenience to jurors and witnesses; to prevent the waste of prosecutorial and judicial resources occasioned by preparation for a trial that could be avoided if a timely and successful motion were made in advance; and to protect the right of the government to appeal the granting of pre-trial motions to suppress (*id.* at A-7 to A-8).

The court also noted that although Rules 12(b) and 41(f), Fed. R. Crim. P., could be read together in a way that would seem to make the filing of motions to suppress before trial permissive rather than mandatory, this was not the intent of the drafters of the rules. It also pointed out that petitioner made no claim of misplaced reliance on such a reading of the rules. Finally, the court reiterated that petitioner and his attorneys must have been aware of the search of the steering column in time to have made the motion to suppress prior to trial and held (Pet. App. A, p. A-11):

> Under these circumstances we find little merit to the contention that the Section 3500 material, supplied at the conclusion of Stoppiello's testimony, was the first information concerning the seizure received by Mauro and his counsel. There was ample opportunity to move to suppress during the nineteen months between the return of the indictment and trial, and the failure to

do so * * * is fatal to Mauro's objection belatedly raised in the course of the trial.[2]

2. Petitioner also contests (Pet. 27-36) the district court's alternative holding that the search and seizure of petitioner's vehicle was legal.

But petitioner indisputably used the automobile to transport the counterfeit money transferred to the undercover agent. As a vehicle used to facilitate the transportation and sale of counterfeit money, it was subject to seizure and forfeiture under 49 U.S.C. 781 and 782. Since the automobile was legally in the possession of the government, the warrantless search of the steering column, upon first learning that counterfeit money was probably hidden there, was lawful. *Cooper* v. *California*, 386 U.S. 58. The district court found that, at the time of the search, the government had lawful custody of the autobmobile (Pet. App. B, p. B-3).[3]

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[2]Petitioner also contends (Pet. 20-22) that the court of appeals should have reached the merits of the suppression question because it will have to do so anyway when petitioner attacks the conviction collaterally. But, if, as we contend, the courts below were correct in regarding untimeliness of the motion to suppress as dispositive in these circumstances, petitioner will properly be foreclosed from mounting a collateral attack on that basis.

[3]As the court of appeals notes (Pet. App. A, p. A-4), the charges against petitioner were dismissed on motion of the government on February 15, 1972, because the initial refusal of Stoppiello to testify made it unlikely that petitioner could be brought to trial within the six months required in the Eastern District of New York, and not, as petitioner claims (Pet. 35-36), because there was no probable cause to hold petitioner.

In any event, in light of the overwhelming evidence against petitioner, including the testimony of Stoppiello and the tape recordings of the three conversations in which petitioner incriminated himself, it is clear that even if the introduction of the five counterfeit bills was in error, the error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.